Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

CAROLYN KENNEDY,

Petitioner,

v.

DRESSER RAND,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

LUCIANO L. LAMA, ESQ.
Counsel of Record

501 A South Meadow Street
Suite A
Ithaca, New York 14850
(607) 275-3425

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

Carolyn Kennedy was a long time employee of Dresser Rand in good standing. In 1995 she suffered from clinically diagnosed depression and insomnia. Her Psychiatrist, a Psychologist and a Certified Social Worker all agreed that her current supervisor, Dennis Emo was the trigger to her depression and that an accommodation was needed changing her supervisor.

An independent efficiency expert, hired by Dresser Rand, recommended that Carolyn Kennedy indeed report to someone different. Dennis Emo also recommended that she report to someone else, and the President of Dresser Rand conceded that it was possible.

Dresser Rand refused to discuss the requested accommodation or make any offer of any accommodation to Carolyn Kennedy. Dresser Rand refused to engage in any interactive process whatsoever.

The lower courts held that the requested accommodation was unreasonable under the Americans With Disabilities Act.

1. Should the Americans With Disabilities Act (ADA) be interpreted in such a way that an accommodation that carries no burden, no expense and may even be beneficial to the employer can be considered unreasonable?

2. Should an employer be absolutely excused from discussing a requested accommodation or entering into an interactive process with employees for the purpose of

QUESTIONS PRESENTED – Continued

securing possible accommodations under the Americans With Disabilities Act?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i
TABLE OF AUTHORITIES iv
PETITION FOR WRIT OF CERTIORARI 1
OPINIONS BELOW 1
JURISDICTION 1
STATUTES INVOLVED IN THIS CASE 2
STATEMENT OF THE CASE 2
REASONS FOR GRANTING THE WRIT 4
POINT I 5
POINT II 9
CONCLUSION 13

TABLE OF AUTHORITIES

Page

CASES

Arneson v. Heckler, 879 F.2d 393 (8th Cir. 1989) 7

Bombard v. Fort Wayne Newspapers, Inc., 92 F.3d 560, 5 AD Cases 1283 (7th Cir. 1996) ... 4, 10, 11, 12

Buckingham v. United States, 998 F.2d 735 (9th Cir. 1993) 5, 11, 12

Bultemeyer v. Ft. Wayne Com. Sch., 100 F.3d 1281 (7th Cir. 1996) 5, 11, 12

Criado v. IBM Corp., 145 F.3d 437 (1st Cir. 1998) 6

Feliberty v. Kemper Corp., 98 F.3d 274 (7th Cir. 1996) 4, 11, 12

Jacques v. Clean-Up Group, Inc., 96 F.3d 506 (1st Cir. 1996) 4, 11, 12

Kennedy v. Dresser Rand, ___ F.3d ___ (2nd Cir. 1999) ..... *passim*

Mengine v. Runyon, 114 F.3d 415 (3rd Cir. 1997).. 4, 11, 12

Ralph v. Lucent Technologies, 135 F.3d 166 (1st Cir. 1998) 4, 11, 12

Roberts v. Progressive IND., 183 F.3d 1215 (10th Cir. 1999) 5, 7, 11, 12

Smith v. Midland Brake Inc., 180 F.3d 1154 (10th Cir. 1999) 5, 11, 12

Taylor v. Phoenixville Sch. Dst., 184 F.3d 296 (3rd Cir. 1999) 4, 9, 11, 12

Vande Zande v. State of Wisconsin Dept. of Ad., 44 F.3d 538 (7th Cir. 1995) 4, 6, 8

TABLE OF AUTHORITIES – Continued

Page

STATUTES

28 U.S.C. § 1254(1) 1

29 U.S.C. § 794 2

42 U.S.C. §§ 12101, et seq 2, 10, 13

MISCELLANEOUS

The U.S. Equal Employment Opportunity Commission, Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, para 8 10

PETITION FOR WRIT OF CERTIORARI

Carolyn Kennedy respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on September 22, 1999 in order to restore effectiveness to the Americans With Disabilities Act on behalf of Mrs. Kennedy and countless other disabled American workers.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit that gives rise to this petition is attached hereto in Appendix A ("App. A").

JURISDICTION

On September 22, the United States Court of Appeals for the Second Circuit affirmed the judgment of the United States District Court for the Western District of New York. Said judgment is attached hereto as Appendix A-2. That judgment was timely appealed to the United States Court of Appeals for the Second Circuit. This petition has been timely filed within 90 days of the entry of that appellate decision.

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN THIS CASE

The Statutes involved in this case are the Americans With Disabilities Act, ("ADA"), 42 U.S.C. §§ 12101, et seq, and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794.

STATEMENT OF THE CASE

The petitioner was employed by the respondent company from 1980 until 1995. During that time, the petitioner's job performance was rated "commendable" for 10 years, "Satisfactory" for four years, and "fair" for three years by the respondent. In 1995, the petitioner was diagnosed with depression, insomnia and posttraumatic stress disorder. Through psychological treatment and analysis it was determined that conflict with her direct supervisor, Dennis Emo, was the trigger and stressor to her depression.

Petitioner requested accommodation for her disability. The accommodation requested was that she be relieved from reporting to, associating with or otherwise being subjected to the antics of Mr. Emo. Other accommodations may also have been required but no discussion would be had by the respondent. Respondent flat out refused to engage in any interactive process or negotiations.

Petitioner's request for accommodations was summarily refused by the respondent. The accommodations that petitioner requested were, in essence, recommended

by the respondent's paid efficiency experts, "Working Solutions". Petitioner's supervisor, Emo, recommended accommodations to the respondent company that would have complied with petitioner's request. Regardless, respondent refused any accommodation to petitioner and refused to engage in any interactive negotiations relative thereto.

Petitioner sued under the Americans with Disabilities Act and the Rehabilitation Act on December 1996. Respondent answered on February 14, 1997. A motion for summary judgment was filed on August 10, 1998 by the respondent. Petitioner responded on September 1, 1998. Respondent replied.

The Circuit Court by Hon. Charles J. Siragusa issued a decision and order granting respondent's motion.

The Decision: The Court below held that "For purposes of this motion, the Court will assume that the petitioner's depression and insomnia constitute physical or mental impairments under the Americans with Disabilities Act and the Rehabilitation Act. Assuming for the purposes of this motion, that the petitioner is a qualified person with a disability, the Court nonetheless finds her argument regarding the requested accommodation to be without merit." As such, the lower Court left but one issue for the sake of this appeal, and that is whether the accommodation requested was reasonable within the meaning and intent of the law.

REASONS FOR GRANTING THE WRIT

I. If the decision of the Second Circuit is allowed to stand, employers will rely on the *Kennedy v. Dresser Rand* decision to refuse accommodations even if there is no cost or burden associated with the requested accommodation. On this issue, *Kennedy v. Dresser Rand*, ___ F.3d ___ (1999) is in direct conflict *Vande Zande v. State of Wisconsin Dept. of Admin.*, 44 F.3d 538 (7th Cir. 1995), (holding that when determining whether an accommodation is reasonable the court should employ a cost benefit analysis).

II. If the decision of the Second Circuit is allowed to remain, employers will cite *Kennedy v. Dresser Rand* as authority that excuses them from engaging in any two-way discussions or interactive process over possible accommodations.

This is in direct conflict with the First Circuit cases, *Jacques v. Clean-Up Group, Inc.*, 96 F.2d 506 (1996) (holding employers must engage in an interactive process to determine a reasonable accommodation for employees), and *Ralph v. Lucent Technologies*, 135 F.3d 166 (1998), (holding employers have a continuing duty to engage in an interactive process with employees regarding reasonable accommodations negotiations); the Third Circuit's decision in *Taylor v. Phoenixville School District*, 174 F.3d 142 (1999) (requiring an interactive process with initiative taken by the employer), *Mengine v. Runyon*, 114 F.3d 415 (1997), (imposing a duty on employers act in good faith and to aid employees in finding reasonable accommodations); the Seventh Circuit decisions in *Bombard v. Fort Wayne Newspapers, Inc.*, 92 F.3d 650, 5 AD Cases 1283 (1996), (requiring an interactive process with initiative taken by the employer), *Feliberty v. Kemper Corp.*, 98 F.3d

274 (1996), (holding that employers have a duty to aid employees in discovering possible reasonable accommodations even where the employee is a medical doctor), *Bultemeyer v. Ft. Wayne Community Schools*, 100 F.3d 1281 (1996), (holding employers have a good faith duty to engage in an interactive process); the Ninth Circuit case, *Buckingham v. United States*, 998 F.2d 735 (1993), (holding that the transfer of an employee is a reasonable accommodation under the ADA and that employers must not interfere with employees' efforts to pursue a normal life); the Tenth Circuit cases, *Roberts v. Progressive Ind.*, 183 F.3d 1215 (1999), (holding as a reasonable accommodation a business trip to Miami accompanied by a private nurse), *Smith v. Midland Brake Inc.*, 180 F.3d 1154 (1999), (holding as a reasonable accommodation reassignment and requiring employers to engage in an interactive process).

POINT I

The Americans With Disabilities Act endeavors to create an avenue of relief for qualified disabled employees by requiring employers to provide such employees reasonable accommodations. However, the Circuit Courts differ as to what is a reasonable accommodation. The Second Circuit in the *Kennedy* decision held that changing an employee's supervisor and preventing that supervisor from further mistreatment of that employee was not a reasonable accommodation under the ADA. The Second Circuit so held despite that the employer's own paid efficiency experts, "Working Solutions," recommendation that such a request would benefit both employee and employer. *Kennedy v. Dresser Rand.*

This decision undermines the very foundation upon which the ADA was enacted.

The Seventh Circuit, in *Vande Zande v. State of Wisconsin Dept. of Ad.*, 44 F.3d 538 (1995), employed a cost benefit analysis while determining whether providing a desktop computer and allowing an employee to work full time from her home qualified as a reasonable accommodation. The court referred to Judge Learned Hand's famous B<PL formula for negligence. *Vande Zande*, 44 F.3d 538. Simply put, an accommodation should be deemed reasonable when the cost to the employer to provide the accommodation is proportionate to the benefits enjoyed by the employee. *id.* This is a sense-based analysis. *id.* When the costs are disproportionately high the accommodation is not reasonable for purposes of the ADA. *id.* However, where the costs of accommodation to the employer are minimal and the benefits to the employee are great the accommodation must be deemed reasonable. *Vande Zande*, 44 F.3d 538. Indeed, the Court in *Kennedy*, concedes that such an analysis applies and yet applied it erroneously.

When the costs of a requested accommodation are not greater than the burden to the company, the accommodation must be deemed reasonable. In *Criado v. IBM Corp.*, 96 F.2d 506 (1st Cir. 1996) the Court balanced the costs of allowing Criado to take paid medical leave as an accommodation for depression against the benefits to Criado. The Court properly concluded that such an accommodation was a reasonable one because it did not financially burden IBM since it would be more costly to hire and train new employees. *id.*

Similarly, in *Roberts v. Progressive IND.*, 183 F.3d 1215 (10th Cir. 1999), the petitioner employee requested that the respondent employer pay for his personal care attendant (PCA) to accompany him on a two-day business trip. The employer refused to provide such care and instead offered to provide only four hours of PCA care when the employee reached his destination. *Id.* The case went to trial and the jury found for the employee. The Tenth Circuit Court of Appeals balanced the costs and benefits and properly found that this was a reasonable accommodation. The Court held that the employer had a duty to reasonably accommodate the employee and had failed to do so. *id.*

Finally, in *Arneson v. Heckler*, 872 F.2d 393 (8th Cir. 1989), the Eighth Circuit Court of Appeals held that the employer was not entitled to summary judgment because there existed triable issues of material fact as to the reasonableness of certain requests by the employee. The employee in this case requested a telephone headset, a quieter office, transfer to a different office location, and/or an assistant. *id.* The lower court granted summary judgment in favor of the employer on the grounds that these were not reasonable accommodations as a matter of law. The Circuit Court, however, held that these requests for accommodations were not unreasonable as a matter of law. *id.* The court further held that the question of reasonableness was not disposable as a matter of law and thus reversed and remanded on the issue of reasonable accommodation. *id.*

Unlike the forgoing cases, the Second Circuit Court of Appeals in the *Kennedy* case erroneously affirmed summary judgment for the respondent where there existed

issues of material fact as to the reasonableness of Kennedy's requested accommodations. Here, the cost or burden to the respondent was de minis. In fact, Kennedy showed that the respondent's very own paid efficiency experts, "Working Solutions," recommended that petitioner not report to Emo. Working Solutions' report stated that Kennedy could simply report to the Human Resource Manager instead. Kennedy further demonstrated, that Emo himself recommended that Kennedy no longer maintain contact with him. Working Solutions predicted a change in supervisor for petitioner would benefit respondent company as well as employee. Accordingly, the cost to the respondent would have amounted to nothing and the benefit to the employee and the company would have been great. Under these circumstances the cost benefit analysis clearly mandates that such an accommodation be deemed reasonable and ordered. At a minimum, the evidence was clearly sufficient to preclude summary judgment. Instead, the Second Circuit failed to weigh the costs against the benefits of the requested accommodation. The Second Circuit summarily ignored the benefits to the company and employee, and that the efficiency experts recommended the accommodation. The Second Circuit held that under petitioner's circumstances a change in supervisor was not reasonable. The analysis employed by the Second Circuit is in direct conflict with the logic applied in *Vande Zande*. The Second Circuit erroneously affirmed summary judgment. Accordingly, the Court should grant Writ of Certiorari to clarify the state of the law regarding Reasonable Accommodations under the ADA.

POINT II

The *Kennedy* decision allows respondent employers to sit back passively and knock down every accommodation requested by employees as too burdensome without engaging in an interactive process to determine what would be reasonable. The Third Circuit, however, stated that there must be an "interactive process" between the employer and the employee. Further, the *Taylor* Court noted, "the interactive process would have little meaning if it was interpreted to allow employers, in the face of a request for accommodation, simply to sit back passively, offer nothing, and then, in post-termination litigation, try to knock down every specific accommodation as too burdensome. That's not the proactive process intended: it does not help avoid litigation by bringing the parties to a negotiated settlement." *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 316 (3d Cir. 1999). However, that is exactly what happened in Mrs. Kennedy's case.

The *Taylor* Court noted that employers can show good faith in the interactive process by "taking steps like the following: meet with the employee who requests the accommodation, request information about the condition and what limitations the employee has, ask the employee what he or she specifically wants, show sign of having considered employee's request, and offer and discuss available alternative when the request is too burdensome."

In the Seventh Circuit, the law is that, "once an employer's responsibility is triggered, the employer must engage with the employee in an 'interactive process' to

determine the appropriate accommodation under the circumstances." *Bombard v. Fort Wayne Newspapers, Inc.*, 92 F.3d 560, 5 AD Cases 1283 (7th Cir. 1996).

The EEOC Guidance states:

> "Is an employer required to provide the reasonable accommodation **that the individual wants?**
>
> The employer may choose among reasonable accommodations as long as the chosen accommodation is effective. Thus as part of the interactive process, the employer may offer alternative suggestions for reasonable accommodations and discuss their effectiveness in removing the workplace barrier that is impeding the individual with a disability" *The U.S. Equal Employment Opportunity Commission, Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, para 8.*

The purpose of the Americans With Disabilities Act is, "(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities; (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities; (3) to ensure that the Federal Government plays a central role in enforcing the standards established in this Act on behalf of individuals with disabilities . . . " 42 U.S.C § 12101(b). The *Kennedy* decision contravenes each and every purpose and foundation of Reasonable Accommodation under the Americans With Disabilities Act. With this decision, there can be no "clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(2). As

a result, the *Kennedy* decision creates a conflict among the Circuits requiring clarification.

Dresser Rand blatantly refused to discuss any accommodation for the Petitioner. Indeed, the respondent merely sat back and knocked down every request for accommodation as too burdensome without more. Yet in the majority of the circuits, the respondent bears the responsibility and duty to engage in an interactive process. *Jacques v. Clean-Up Group, Inc.*, 96 F.2d 506 (1st Cir. 1996), *Ralph v. Lucent Technologies*, 135 F.3d 166 (1st Cir. 1998), *Taylor v. Phoenixville School District*, 174 F.3d 142 (3rd Cir. 1999), *Mengine v. Runyon*, 114 F.3d 415 (3rd Cir. 1997), *Bombard v. Fort Wayne Newspapers, Inc.*, 92 F.3d 650, 5 AD Cases 1283 (7th Cir. 1996), *Feliberty v. Kemper Corp.*, 98 F.3d 274 (7th Cir. 1996), *Bultemeyer v. Ft. Wayne Community Schools*, 100 F.3d 1281 (7th Cir. 1996), *Buckingham v. United States*, 998 F.2d 735 (9th Cir. 1993), *Roberts v. Progressive Ind.*, 183 F.3d 1215 (10th Cir. 1999), *Smith v. Midland Brake Inc.*, 180 F.3d 1154 (10th Cir. 1999). The respondent refused to engage in any good faith interactive process. All requests for meetings regarding accommodations for petitioner were summarily denied. All good faith attempts by petitioner were met with respondent's bad faith refusal to cooperate or engage in any interactive process. As such, respondent breached its duty to act in good faith to negotiate with petitioner and no resolution was made.

The purposes of the ADA were thrown aside and respondent enjoyed immunity from the good faith requirements of the ADA by means of the Second Circuit's upholding the dismissal of petitioner's requests for

accommodations. The *Kennedy* decision ignores the foundation of the ADA and renders it a dull and nearly useless tool of employee remedy. If the *Kennedy* decision stands, employers in the Second Circuit will remain shielded from any duty to act in good faith and engage in interactive processes with employees to remedy accommodation issues. This certainly undermines the ADA to the point where it provides no relief for aggrieved employees. Moreover, such a decision runs afoul of the EEOC Guidelines and established case law requiring employers to act in good faith and engage in some meaningful interactive process with the disabled employee. *Jacques v. Clean-Up Group, Inc.*, 96 F.2d 506 (1st Cir. 1996), *Ralph v. Lucent Technologies*, 135 F.3d 166 (1st Cir. 1998), *Taylor v. Phoenixville School District*, 174 F.3d 142 (3rd Cir. 1999), *Mengine v. Runyon*, 114 F.3d 415 (3rd Cir. 1997), *Bombard v. Fort Wayne Newspapers, Inc.*, 92 F.3d 650, 5 AD Cases 1283 (7th Cir. 1996), *Feliberty v. Kemper Corp.*, 98 F.3d 274 (7th Cir. 1996), *Bultemeyer v. Ft. Wayne Community Schools*, 100 F.3d 1281 (7th Cir. 1996), *Buckingham v. United States*, 998 F.2d 735 (9th Cir. 1993), *Roberts v. Progressive Ind.*, 183 F.3d 1215 (10th Cir. 1999), *Smith v. Midland Brake Inc.*, 180 F.3d 1154 (10th Cir. 1999).

The *Kennedy* decision affronts the trend of the aforementioned decisions in construing the requirements of the ADA by allowing employers in the Second Circuit to escape good faith and interactive process duties. Nearly all the Circuits impose upon the employer a good faith duty to engage in an interactive process with employees. The *Kennedy* decision conflicts with the law of those Circuits thus frustrating Congress's intent, "to provide

clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(2). The *Kennedy* decision renders uncertain the state of the law interpreting employer's duties to engage in an interactive process. This issue is ripe for the United States Supreme Court to Grant Writ of Certiorari.

CONCLUSION

Kennedy was a loyal employee to the respondent for fifteen years until she fell ill with depression, insomnia, and posttraumatic stress disorder. The cause of her depression was extreme mistreatment by her supervisor, Dennis Emo. As such, Kennedy requested a simple and reasonable accommodation. Namely that she could report to a different supervisor and avoid all further contact with Emo. In fact Emo himself recommended the same accommodation. The respondent's own hired efficiency experts reported that such an accommodation was not only possible, but would benefit respondent as well as Kennedy. Nonetheless, respondent summarily refused the accommodation. Moreover, respondent refused to engage in the legally required interactive process to assist Kennedy in finding any possible alternative reasonable accommodations.

The law is clear. Under these circumstances, respondent owed a duty to provide the requested reasonable accommodation. The *Kennedy* decision essentially usurps the purposes of the ADA by denying employees any relief where there is no cost to the respondent employer

in providing a reasonable accommodation. Additionally, the decision grants summary judgment where there exists material questions of fact as to the reasonableness of an accommodation. The evidence presented by Kennedy was clearly sufficient to at least raise a question of fact precluding summary judgment. Finally, the *Kennedy* decision further confuses the state of the law with regards to the employer's duty to engage in an interactive process. The majority of circuits impose a good faith duty to engage in an interactive process on employers. The Second Circuit Court of Appeals, however, vitiates any such duty and instead shields employers from any good faith requirements. If the *Kennedy* decisions is allowed to stand, employers will cite it as an authority allowing them to sit back passively and knock down every accommodation requested by employees as too burdensome without engaging in an interactive process to determine what would be reasonable. As such, *Kennedy* decision undermines the very foundations upon which the ADA was enacted and creates several conflicts among the Circuit Courts. Therefore, the Writ of Certiorari should be granted.

Respectfully submitted,

LUCIANO L. LAMA, ESQ.
Counsel of Record
501 A South Meadow Street
Suite A
Ithaca, New York 14850
(607) 275-3425

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 1999

(Argued: September 13, 1999 Decided: September 22, 1999)

Docket No. 98-9629

CAROLYN M. KENNEDY,
Plaintiff-Appellant,

v.

DRESSER RAND CO.,
Defendant-Appellee.

Before: VAN GRAAFEILAND, CALABRESI and SACK, *Circuit Judges.*

Appeal from an order of the Western District of New York (Siragusa, *J.*) granting defendant's motion for summary judgment. Plaintiff-appellant brought a claim under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, *et seq.*, and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794. The district court held that the defendant-appellees were entitled to summary judgment because the plaintiff-apellant's proposed accommodation was unreasonable as a matter of law.

Affirmed.

LUCIANO L. LAMA, Ithaca, N.Y., *for Plaintiff-Appellant.*

EUGUENE D. ULTERINO, Nixon, Hargrave, Devans & Dolye LLP, Rochester, N.Y. (Stanley J. Matusz, of counsel), *for Defendant-Appellee.*

PER CURIAM:

Plaintiff-Appellant Carolyn M. Kennedy appeals from an order of the district court for the Western District of New York (Siragusa, *J.*), granting the motion of defendant-appellee Dresser Rand Co. ("Dresser") for summary judgment. Kennedy brought her claims under the ADA and Rehabilitation Act, alleging that she suffered from "depression" and that her supervisor at Dresser, Dennis Emo, was the "trigger and stressor to her depression." In order to establish a prima facie case under the ADA and Rehabilitation Act, a plaintiff must show that, "with reasonable accommodation," she could perform the essential functions of the job. *See Stone v. City of Mount Vernon*, 118 F.3d 92, 96-97 (2d Cir. 1997), *cert. denied*, 118 S. Ct. 1044 (1998). Prior to leaving Dresser, Kennedy requested that "she no longer work for, report to, associate with, or be influenced by her assigned supervisor . . . and that Dresser Rand Company eliminate any personal contact between plaintiff and [her supervisor]." The only issue we consider in this case is whether Kennedy's requested accommodation was a reasonable one. We conclude that it was not.

I. BACKGROUND

The following facts are uncontested by the parties. In 1978, Kennedy began working at Dresser as a part-time nurse. In 1979, she became a full-time nurse, and between 1979 and 1995, Kennedy worked for Dresser and was supervised, either directly or indirectly, by Dennis Emo, who oversaw all of Dresser's health care personnel. In 1992, Kennedy was assigned responsibility for Dresser's

workers' compensation claims. This job required her to work closely with Emo, who was considered to be the "workers compensation expert at the plant."

Between 1985 and 1995, Kennedy became convinced that she was being harassed by Emo. This harrasment took the form of critical evaluations and criticism of Kennedy's attitude. Kennedy also alleges that Emo "taunted me, sneered at me, [and] spoke to me in sarcastic and insulting tones constantly." On December 20, 1995, Kennedy notified Dresser that she had been diagnosed with depression. The letter stated that her depression resulted from "continuous, unrelenting mistreatment and unnecessary harassment" by Emo. Moreover, it demanded that Kennedy "be relieved from reporting to, associating with, or otherwise being subjected to the antics of Mr. Emo." The letter mentions "additional accommodations" that "may be required," but there is no evidence of any other requests for accommodation by Kennedy or of any modification of her request that she be relieved of any contact with Emo.

When Dresser failed to meet Kennedy's demand for accommodation, she left work and ultimately brought this action. After the close of discovery, Dresser moved for summary judgment. The district court granted Dresser's motion, concluding that "[b]ecause the plaintiff has failed to demonstrate that her requested accommodation is reasonable, she has failed to establish a prima facie case" of discrimination. Arguing that the accommodation she requested was reasonable, Kennedy appeals the district court's grant of summary judgment.

II. DISCUSSION

We review a district court's grant of summary judgment *de novo*, drawing all reasonable factual inferences in favor of the nonmoving party. *See McPherson v. Coombe*, 174 F.3d 276, 279-80 (2d Cir – 1999). Summary judgment is only appropriate "if, viewing all evidence in the light most favorable to the nonmoving party, there is no genuine issue of material fact." *Buttry v. General Signal Corp.*, 68 F.3d 1488, 1492 (2d Cir. 1995).

In order to establish a prima facie case under the ADA or the Rehabilitation Act, the plaintiff "must show, as part of her burden of persuasion, that an effective accommodation exists that would render her otherwise qualified." *Borkowski v. Valley Cent. Sch. Dist.*, 63 F.3d 131, 139 (2d Cir. 1995). "On the issue of reasonable accommodation, the plaintiff bears only the burden of identifying an accommodation, the costs of which, facially, do not clearly exceed its benefits." *Id.* This burden is not a heavy one. *See id.* Moreover, the question of whether a proposed accommodation is reasonable is "fact-specific" and must be evaluated on "a case-by-case basis." *Wernick v. Federal Reserve Bank*, 91 F.3d 379, 385 (2d Cir. 1996). Nevertheless, district courts may properly grant summary judgment when a plaintiff fails to meet even this light burden. *See id., Borkowski*, 63 F.3d at 139.

In rejecting Kennedy's proposed accommodation, the district court – after assuming *arguendo* that Kennedy's disability qualified her under the ADA and Rehabilitation

Act[1] – cited *Wernick*, 91 F.3d at 384, and stated flatly that "the replacement of a supervisor is not a plausible accommodation." [A430] In so doing, the court appeared to read *Wernick* as establishing a per se rule that the replacement of a supervisor cannot be a reasonable accommodation. The Seventh Circuit, in an ADA case, has apparently adopted such a per se rule against the reasonableness of requests for transfer to a different supervisor. *See Weiler v. Household Fin. Corp.*, 101 F.3d 519, 526 (7th Cir. 1996) ("The ADA does not require HFC to transfer Weiler to work for a supervisor other that Skorupka, or to transfer Skorupka."). Similarly, EEOC guidelines seemingly embrace the notion that a request for a change of supervisor is per se unreasonable. *See EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans With Disabilities Act*, 8 Fair Employment Prac. Manual (BNA) 405:7625.

As *Wernick* clearly states, however, in this Circuit, the question of whether a requested accommodation is a reasonable one must be evaluated on a case-by-case basis. *See* 91 F.3d at 385. A per se rule stating that the replacement of a supervisor can never be a reasonable accommodation is therefore inconsistent with our ADA case

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[1] That she qualifies under the statutes, however, are by no means clear. In order to demonstrate that she qualifies as disabled under the ADA and Rehabilitation Act, a person must show that (1) she has a physical or mental impairment and (2) that such impairment substantially limits one or more of her major life activities. *See Wernick*, 91 F.3d at 383. Moreover, "[a]n impairment that disqualifies a person from only a narrow range of jobs is not considered a substantially limiting one." *Heitweil v. Mount Sinai Hosp.*, 32 F.3d 718, 723 (2d Cir. 1994).

law. There is a presumption, however, that a request to change supervisors is unreasonable, and the burden of overcoming that presumption (i.e., of demonstrating that, within the particular context of the plaintiff's workplace, the request was reasonable) therefore lies with the plaintiff. *Cf. Borkowski*, 63 F.3d at 139 (stating, even in the absence of a formal presumption, that "the plaintiff must show, as part of her burden of persuasion, that an effective accommodation exists that would render her otherwise qualified").

In this case, Kennedy has not met her burden of identifying an accommodation "the costs of which, facially, do not clearly exceed its benefits." *Id.* First, Kennedy has presented none of the types of facts that would suggest that in her particular workplace, a change of supervisors could be accomplished without excessive organizational costs.[2] Second, Kennedy's request was not

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[2] Kennedy points to several facts that she argues demonstrate that the requested accommodation would not be excessively costly. First, she cites a 1995 report written by outside consultants suggesting that Kennedy's position be reorganized such that she would report directly to the "Human Resource manager." Second, she notes that when asked at his deposition whether Kennedy's reassignment was possible, the president of Dresser stated answered that "[a]nything's possible." The report recommendations concerning Kennedy's job, however, were rejected by the company before this litigation ever began. The reason given for that rejection was that, because Emo was the plant expert on workers' compensation, it was necessary for the employee in charge of workers' compensation claims to report directly to him. We are loathe to tell a company how to structure its workforce. *See Wernick*, 91 F.3d at 384 ("[N]othing in the law leads us to conclude that in enacting the disability acts, Congress intended

simply for reassignment to a different supervisor but also for protection from *any* interaction with Emo. In the context of the particular workplace described in the record before us, it would be virtually impossible for Kennedy to perform her job of coordinating workers' compensation claims without at least some contact with Emo, who supervises all health care personnel and who is the plant "expert" on workers' compensation. Because, on the facts of this case, Kennedy has not met her burden of identifying a reasonable accommodation, the district court did not err in granting Dresser's motion for summary judgment.

* * *

The judgment of the district court is affirmed.

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to interfere with the personnel decisions within an organizational hierarchy."). Even if we were to find that the consultants' report raised a genuine issue of fact as to the costs associated with reassigning Kennedy to a different supervisor, neither the report (nor the company president's statement) could plausibly be construed as evidence of the reasonableness of Kennedy's demand to have no contact whatsoever with Emo.

Similarly, Kennedy argues that an email by Emo listing a series of options for Kennedy's reassignment demonstrates that her request was reasonable. The options listed in Emo's email, however, would either have required Kennedy to move to a completely different job – something she has not requested – or would still have entailed substantial interactions with Emo – thus failing to satisfy her request of no contact with her former supervisor.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, Foley Square, on the 22nd day of September, one thousand nine hundred and ninety-nine.

BEFORE: Hon. Elisworth A. Van Graafeiland
Hon. Guido Calabresi
Hon. Robert D. Sack

Circuit Judges

Docket No. 98-9629

CAROLYN M. KENNEDY,

Plaintiff-Appellant,

-v-

DRESSER RAND CO.,

Defendant-Appellee.

(Filed Sept. 22, 1999)

Appeal from the United States District Court for the Western District of New York.

This cause came on to be heard on the transcript of record from the Western District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby **ORDERED, ADJUDGED,** and **DECREED** that the order of said district court be and it hereby is affirmed in accordance with the opinion of this court.

FOR THE COURT
Karen Greve Milton, Acting Clerk
By:

/s/ Beth J. Meador
Beth J. Meador
Administrative Attorney

(2) Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

CAROLYN KENNEDY,

Petitioner,

v.

DRESSER RAND,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

LUCIANO L. LAMA, ESQ.
Counsel of Record
501 A South Meadow Street
Suite A
Ithaca, New York 14850
(607) 275-3425

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Kennedy

Plaintiff(s)

v. 6:97-cv-06015

Dresser Rand Co.

Defendant(s)

PLEASE take notice of the entry of an ORDER filed on 11/24/98, of which the within is a copy, and entered 11/25/98 upon the official docket in this case. (Document No. 25.)

Dated: Rochester, New York
November 25, 1998

RODNEY C. EARLY, Clerk
U.S. District Court
Western District of New York
2120 U.S. Courthouse
100 State Street
Rochester, New York 14614

Enclosure
TO:

Luciano L. Lama, Esq.
Eugene D. Ulterino, Esq.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

CAROLYN M. KENNEDY,

Plaintiff DECISION and ORDER

-vs- 97-CV-6015

DRESSER RAND COMPANY,

Defendant

This is an action in which the plaintiff claims that her employer discriminated against her, in violation of the Americans with Disabilities Act, 42 U.S.C. § 12101, et seq., and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. Now before the Court are the defendant's motion for summary judgment and the plaintiff's cross-motion for sanctions. For the reasons that follow, the plaintiff's cross-motion for sanctions is denied, the defendant's motion for summary judgment is granted, and the complaint is dismissed with prejudice.

BACKGROUND

The plaintiff began working for the defendant part-time as an occupational nurse in 1978. Between 1979 and 1995, the plaintiff worked full-time. Between 1985 and 1995, the plaintiff came to believe that she was being "harassed" by her supervisor, Dennis Emo. This alleged harassment took the form of two job reassignments, a few critical evaluations, and criticism of the plaintiff's attitude. The plaintiff did receive negative evaluations and

criticism from supervisors other than Mr. Emo during that period. During her seventeen years as an employee, the plaintiff received annual performance evaluations, with ten overall ratings of commendable, four overall ratings of satisfactory, and two overall ratings of fair.[1] The plaintiff's overall rating in 1995 was fair, with a 2.5 numerical rating. The lowest rating during this period was in 1989, when the plaintiff received an overall rating of fair, and a numerical rating of 2. During all other years, the plaintiff received overall ratings of either commendable or satisfactory, with numerical ratings of either 4 of [sic] 3. During this same period, the plaintiff was given average annual salary increases of 5.53%. 1989 and 1995 were the only years in which the plaintiff did not receive a salary increase. In October of 1995, Mr. Emo reassigned the plaintiff from one set of duties to another, apparently lateral, set of duties, which reassignment upset the plaintiff very much. On December 20, 1995, the plaintiff notified the defendant that she had been diagnosed with depression. Prior to that, the plaintiff had never been diagnosed with depression, and had never notified the defendant that she was suffering from depression or any other physical or mental impairment. In her December 20th letter, the plaintiff stated that her depression was the result of "continuous, unrelenting mistreatment and unnecessary harassment" by her supervisor, Dennis Emo. The letter further stated that

> demand is hereby made for accommodations such that she be relieved from reporting to, associating with or otherwise being subjected to

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[1] No overall rating was given in 1979.

> the antics of Mr. Emo. Additional accommodations may be required relative to Mrs. Kennedy's job duties.

Although the letter mentions "additional accommodations," the only accommodation that the plaintiff has ever requested is that she be relieved of reporting to or dealing with her supervisor, Mr. Emo. By letter dated January 12, 1996, the plaintiff's counsel again wrote to the defendant and stated, in relevant part, that

> we made our first demand for reasonable accommodations in our letter of December 20, 1995, and we consider that request, to date, denied or otherwise ignored. We further consider the failure of Dresser-Rand to act as its first violation of the Americans With Disabilities Act. We hereby again, demand that reasonable accommodations be made for Ms. Kennedy by Dresser-Rand by eliminating all personal contact with Mr. Emo including written communications and phone calls.

In response, the defendant requested that the plaintiff provide medical documentation, so that the defendant could evaluate her request. The plaintiff provided two letters, one from a Dr. Jana Pulkrabek, M.D., and one from a William J. Lasher, M.D.[2]. Dr. Pulkrabek's letter states, in relevant part, that the plaintiff "suffers from depression . . . and insomnia." Dr. Lasher's letter states,

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[2] Neither letter is on physician's letterhead, and as the defendant contends, it appears that both letters were in fact drafted by the plaintiff's counsel, although they were signed by the doctors.

in relevant part, that the plaintiff "suffers from depression and insomnia," and that "[t]he primary accommodation necessary for her safe return to work is the removal of the influence of her current supervisor, Dennis Emo." The defendant refused to grant the plaintiff's requested accommodation, and although it does not dispute that such an accommodation would have been theoretically "possible." Sometime in January of 1996, the plaintiff voluntarily stopped working at Dresser-Rand, although she contends that the defendant's refusal to accommodate her "constructively terminated" her employment. Some time after January of 1996, while out of work on disability, the plaintiff attended educational seminars and conferences for which she requested reimbursement from the defendant, however the defendant has refused to reimburse her. The plaintiff claims that the defendant's refusal to reimburse her is retaliatory, although she cannot identify any similarly situated employee who has received such reimbursement. The plaintiff also claims that after she left the company, the defendant retaliated against her by refusing to return certain personal belongings. However, the defendant states that it had been advised by the plaintiff's counsel to have no direct contact with the plaintiff, and that the items of personal property were in fact returned to the plaintiff, through her counsel. Since January of 1996, the plaintiff has not obtained other employment.

On January 14, 1997, the plaintiff commenced this action. She contends that the defendant failed to accommodate her, constructively terminated her, and retaliated against her. The complaint alleges, inter alia, that the

> plaintiff suffers from a disability as is defined by the Americans with Disabilities Act to wit: plaintiff has been diagnosed with major depression (DSM IV: 296.20) and insomnia, post traumatic stress disorder (DSM-IV: 309.21)[3] and as a result thereof, plaintiff suffers disturbances in sleeping, eating, inability to concentrate and fatigue. As a result of said disability, plaintiff has not been able to perform any gainful employment. Plaintiff has been tearful, anxious and extremely depressed, severely limiting her major life activities.
>
> * * *
>
> Plaintiff suffers from physical and mental impairments . . . that substantially limit one or more of the major life activities, to include caring for oneself, performing manual tasks, walking, seeing, learning, remembering, sleeping and the ability to secure and retain employment.

The defendant moved for summary judgment on August 10, 1998. In her affidavit submitted in opposition to the defendant's motion for summary judgment, the plaintiff states that at the present time, she suffers from

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[3] Although the plaintiff claims that she suffers from post-traumatic stress disorder, the defendant's expert psychiatrist, David J. Barry, M.D., concluded that she did not meet the definition for post-traumatic stress disorder. When the plaintiff's own psychiatrist, Dr. Lasher, was asked at his deposition if he agreed with Dr. Barry's analysis, he responded, "[s]trictly speaking, yes, I'd agree with that, if you go by the direct definition." JoAnn Morse-Clough, the plaintiff's clinical social worker, also testified that the plaintiff had not experienced a traumatic event within the meaning of a post-traumatic stress disorder diagnosis.

depression and insomnia, which causes her to feel "tired everyday." She also states that on some days, the fatigue, depression and insomnia cause her to be "tearful, exhausted and incapable of any activity at all." However, in the plaintiff's answers to the defendant's first set of interrogatories, the plaintiff stated, in relevant part, that

> [p]laintiff considered herself a Dresser Rand employee with a temporary disability, which could be resolved any day. Plaintiff fully believed that she would be able to return to work if she did not have to report to Dennis Emo.

(Emphasis added). On April 4, 1996, approximately four months after she stopped working, the plaintiff's clinical social Worker, JoAnn Morse-Clough, noted that

> Carolyn was feeling very good. She had actually applied for a job that was involving a company in Texas but would allow her to be able to work out of her home . . . Though she is not as invested in the outcome of this application, she is very pleased that she could follow through with it. She thought it was very symbolic of her changes and her beginning to feel as though she was capable of taking care of herself . . . She greatly misses work . . . and would very much like to try to return to that organization if she does not have to have the same supervisor.

After she stopped working at Dresser Rand, the plaintiff returned to college and earned her bachelor's degree in psychology, and she continued to attend other educational courses and seminars. At present, the plaintiff still claims to suffer from depression and insomnia, however, she continues to assert that she is ready, able and willing

to return to work at Dresser Rand, as long as she does not have to interact with Dennis Emo.

In addition to opposing the defendant's motion for summary judgment, the plaintiff has cross-moved for sanctions pursuant to Fed. R. Civ. P. 37, claiming that two employees of the defendant, who were deposed on January 14, 1998 and March 4, 1998, were "evasive, gave incomplete answers, caused waste of time and lied." Pursuant to a scheduling order of this Court, factual discovery in this action was completed on March 15, 1998. The plaintiff has never made any motion to compel in relation to the alleged discovery abuses, and apparently has made no effort to resolve this discovery dispute with opposing counsel before seeking sanctions from this Court.

ANALYSIS

First, the plaintiff's cross-motion for sanctions is denied. Any motion to compel involving the subject depositions should have been made on or before March 15, 1998, the deadline for all factual discovery. Moreover, pursuant to Fed. R. Civ. P. 37(a)(2)(B), any such motion to compel "must include a certification that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action." The plaintiff has not included this certification, nor has she offered any explanation for why she waited until approximately five months after the close of factual discovery before making this motion. Accordingly, this motion is denied.

The standard for granting summary judgment is well established. Summary judgment may not be granted

unless "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). A party seeking summary judgment bears the burden of establishing that no genuine issue of material fact exists. *See, Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). "[T]he movant must make a prima facie showing that the standard for obtaining summary judgment has been satisfied." 11 Moore's Federal Practice, § 56.11[1][a] (Matthew Bender 3d ed.). In moving for summary judgment against a party who will bear the ultimate burden of proof at trial, the movant may satisfy this burden by pointing to an absence of evidence to support an essential element of the nonmoving party's claim. *See, Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Once that burden has been established, the burden then shifts to the non-moving party to demonstrate "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). To carry this burden, the non-moving party must present evidence sufficient to support a jury verdict in its favor. *Anderson*, 477 U.S. at 249. Summary judgment is appropriate only where, "after drawing all reasonable inferences in favor of the party against whom summary judgment is sought, no reasonable trier of fact could find in favor of the non moving party." *Leon v. Murphy*, 988 F.2d 303, 308 (2d Cir. 1993).

The Americans With Disabilities Act (ADA) provides in relevant part that

> [n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to . . . the hiring, advancement, or discharge of employees, employee compensation . . . and other terms, conditions and privileges of employment.

42 U.S.C. § 12112(a). The Rehabilitation Act requires, in relevant part, that

> [n]o otherwise qualified individual with a disability in the United States . . . shall solely by reason of her or his disability, be . . . subjected to discrimination under any program or activity receiving Federal financial assistance.

29 U.S.C. § 794(a). Under both the ADA and the Rehabilitation Act, "a plaintiff can establish a prima facie case . . . by showing (1) that he is an individual who has a disability within the meaning of the statute, (2) that an employer covered by the statute had notice of his disability, (3) that with reasonable accommodation, he could perform the essential functions of the position sought, and (4) that the employer has refused to make such accommodations." *Stone v. City of Mount Vernon,* 118 F.3d 92, 96-97 (2nd Cir. 1997), *cert. denied,* 140 L.Ed.2d 109, 118 S.Ct. 1044 (1998). In order to demonstrate that she is disabled, the plaintiff must prove two elements: "(1) that she has a physical or mental impairment; and (2) that such impairment substantially limits one or more of her major life activities." *Wernick v. Fed. Reserve Bank of New York,* 91 F.3d 379, 383 (2d Cir. 1996). "The regulations define major life activities as "[sic] functions such as caring for one's self, performing manual tasks, walking,

seeing, hearing, speaking, breathing, learning, and working." [sic] *Id.* (*citing* 45 C.F.R. § 84.3(j)(2)(ii) (Rehabilitation Act) and 29 C.F.R. § 1630.2(h)(2)(i) (ADA)). The term "substantially limits" is defined as meaning, in relevant part.

> [s]ignificantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner or duration under which the average person in the general population can perform that same major life activity.

29 C.F.R. § 1630.2(j)(1)(ii).

The plaintiff bears an initial burden of production to demonstrate that the requested accommodation is reasonable. *Stone*, 118 F.3d at 98. To carry this initial burden, "[i]t is enough for the plaintiff to suggest the existence of a plausible accommodation, the costs of which, facially, do not clearly exceed its benefits." *Id.* (*citing Borkowski v. Valley Cent. School Dist.*, 63 F.3d 131, 138 (2d Cir. 1995). If the plaintiff fails to suggest such a plausible accommodation, she has not established a prima facie case, and the claim must be dismissed. *See, D'Amico v. City of New York*, 132 F.3d 145, 151-52 (2d Cir. 1998), *cert. denied*, 141 L.Ed.2d 151, 118 S.Ct. 2075 (1998).

The first issue that the Court must address is whether or not the plaintiff is disabled. For purposes of this motion, the Court will assume that the plaintiff's depression and insomnia constitute physical or mental impairments under the Americans With Disabilities Act and the Rehabilitation Act. Next, the Court must examine whether or not these impairments substantially limit a major life activity. With respect to the major life activity

of working, the term "substantially limits" means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working. *Wernick*, 91 F.3d at 383-84 (*citing* 29 C.F.R. § 1630.2(j)(3)(i)).

In its motion for summary judgment, the defendant argues that the plaintiff is not disabled, because her impairments do not substantially limit the major life activity of working. The defendant further argues that even if she were disabled, her requested accommodation is not reasonable. At oral argument of this motion, the plaintiff's counsel conceded that her impairments do not substantially limit the major life function of working. However, the plaintiff does maintain that her impairment's substantially limit the major life functions of sleeping and eating, among others. The plaintiff also notes that the defendant has admitted that it would be "possible" to assign her to a new supervisor. Therefore, the plaintiff argues, she is a qualified person with a disability under the statutes, and summary judgment should be denied since a factual issue exists as to whether or not the accommodation she requests is reasonable. Assuming for purposes of this motion, that the plaintiff is a qualified person with a disability, the Court nonetheless finds her argument regarding the requested accommodation to be without merit.

The only accommodation that plaintiff has requested is that she be allowed to have absolutely no interaction with her former supervisor, Dennis Emo. However, the

plaintiff concedes that this accommodation will not change her situation. As of January 1998, two years after she stopped having any interaction with Mr. Emo, the plaintiff claimed to still suffer from depression and insomnia. And, as the plaintiff's counsel argued in his memorandum of law,

> [w]hen Mr. Emo is removed from her world, her depression does not disappear, nor does her posttraumatic stress disorder, her loss of appetite, loss of weight, loss of sleep and her need for medical and psychiatric care.

Moreover, the replacement of a supervisor is not a plausible accommodation. *See, Wernick,* 91 F.3d at 384. As the court in *Wernick* stated, "nothing in the law leads us to conclude that in enacting the disability acts, Congress intended to interfere with personnel decisions within an organizational hierarchy." *Id.* Because the plaintiff has failed to demonstrate that her requested accommodation is reasonable, she has failed to establish a prima facie case, and her claims for failure to accommodate under both the Rehabilitation Act and the Americans With Disabilities Act must be dismissed. *See, D'Amico,* 132 F.3d at 151-52.

The plaintiff's retaliation claims must also be dismissed. To state a claim for retaliation, the plaintiff must show "(1) participation in a protected activity know [sic] to the defendant, (2) an employment action disadvantaging the plaintiff, and (3) a causal connection between the protected activity and the adverse employment action." *Querry v. Messar,* 14 F.Supp.2d 437, 450 (S.D.N.Y. 1998) (*citing Gallagher v. Delaney,* 139 F.3d 338, 349 (2d Cir.

1998)). With respect to the claim that the defendant retaliated against the plaintiff by refusing to reimburse her for expenses she incurred while out of work on disability, the plaintiff has failed to demonstrate that she was entitled to such reimbursement and has failed to identify any similarly situated employee who was reimbursed. With respect to the claim that the defendant wrongfully withheld the plaintiff's personal property after she requested it, the defendant has established that it was directed by the plaintiff's counsel not to have any direct contact with the plaintiff, and that accordingly, the defendant returned the plaintiff's property to the plaintiff's attorney, instead of returning it directly to the plaintiff. The plaintiff did not come forward with any evidence to refute the defendant's evidence presented on these two points, nor did the plaintiff address these retaliation claims in its memorandum of law. Accordingly, the Court finds that the plaintiff has failed to make out a prima facie case of retaliation, and those claims must also be dismissed.

Finally, in opposing the defendant's summary judgment motion, the plaintiff has raised, for the first time, the claim that prior to December of 1995, the defendant "knew or should have known" that the plaintiff suffered from a disability, and that the defendant discriminated against the plaintiff prior to December of 1995. Not only was this claim not alleged in the complaint, it is directly contrary to the plaintiff's counsel's own statement to the defendant, in January of 1996, that "[w]e further consider the failure of Dresser-Rand to accommodate the plaintiff as requested in the plaintiff's December 20, 1995 [letter] as its first violation of the Americans With Disabilities Act." (Emphasis added). Moreover, this claim was not

raised before the EEOC. Therefore, this claim is not properly before the Court, and must be dismissed.

CONCLUSION

Accordingly, the defendants' motion for summary judgment [#15] is granted in all respects and the complaint herein is dismissed with prejudice. The defendant's cross motion for sanctions [#22] is denied.

So ordered.

Dated: Rochester, New York
November 23, 1998

ENTER:

/s/ Charles J. Siragusa
CHARLES J. SIRAGUSA
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

CAROLYN KENNEDY,

Plaintiff,

v.

DRESSER RAND COMPANY,

Defendant.

NOTICE OF APPEAL

(Filed Dec. 14, 1998)

Case No.: 6:97-CV-06015

SIRS:

PLEASE TAKE NOTICE that the Plaintiff hereby appeals to the Court of Appeals, Second Circuit, from a decision rendered on the 25 day of November, 1998, and from each and every part thereof and from each and every intermediate order therein made.

Dated: December 7, 1998
Ithaca, New York

Yours, etc.,

/s/ Luciano L. Lama
Luciano L. Lama, Esq.
Attorney for Plaintiff
Office & P.O. Address
501A South Meadow Street
Ithaca, New York 14850
(607) 275-3425

To: Eugene D. Ulterino, Esq.
Nixon, Hargrave, Devans & Doyle, LLP
Attorneys for Defendant
Office & P.O. Address
Clinton Square
P.O. Box 1051
Rochester, New York 14603-1051
(716) 263-1000

United States District Court
Western District of New York
Attn.: Rodney C. Early, Clerk
Office & P.O. Address
2120 U.S. Courthouse
100 State Street
Rochester, New York 14614

United States Court of Appeals
Second Circuit
Attn.: Court Clerk
U.S. Courthouse
40 Foley Square
New York, NY 10007